Record No. 82-1112

IN THE

Supreme Court of the United States

OCTOBER 1982 TERM

LEONARD P. KLINE,
Petitioner,

vs.

THE CITY OF FAIRFAX, VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

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BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

May a municipal government, consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution, experiment with and modify its procedures for payment of accrued sick leave at retirement when, under Virginia law, there are no contract or property rights involved, there are no vested rights involved, when Petitioner Kline was compensated fully in accordance with the ordinances in effect at the date of his retirement and when Kline never had any of his accrued sick leave taken away?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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STATEMENT OF JURISDICTIONAL GROUNDS

Kline applies to this Court for a writ of certiorari pursuant to 28 U.S.C. § 1257(3). However, this case draws into question the validity of a state statute, which includes a municipal ordinance, *Reinman v. City of Little Rock*, 237 U.S. 171, 59 L.Ed. 900 (1915), on the ground of its being repugnant to the United States Constitution. The decision of the Circuit Court of Fairfax County, Virginia was that the Ordinance is valid. The Supreme Court of Virginia affirmed this decision, finding no reversible error. Therefore, this matter properly comes before this

Court on appeal, pursuant to 28 U.S.C. § 1257(2), and not a Petition for Writ of Certiorari, as claimed by Kline.

As the proper jurisdictional basis for this matter is by appeal under 28 U.S.C. § 1257(2),[1] Kline is required to comply with Rules 15.1 (e)(ii), (h) and (j)(iv) of the Rules of this Court. The Order of the Supreme Court of Virginia denying review of this action was entered October 8, 1982. Under 28 U.S.C. § 2101(c), a Notice of Appeal must be filed with the state court within ninety days of the date of the judgment appealed from. No notice of appeal has, as of the date of this brief, been filed by Kline in the Supreme Court of Virginia. Accordingly, Kline has not noticed his appeal to this Court in a timely fashion and therefore, his appeal must be dismissed. *Donner v. Anton*, 444 U.S. 958, 62 L.Ed.2d 371 (1979).

Alternatively, even if this Court believes it has jurisdiction to entertain this action on a petition for a writ of certiorari, the Petition should be denied for the reasons discussed below.

STATEMENT OF THE CASE

This case arises from a former municipal employee's objection to one small part of the evolving comprehensive personnel administration plan of the City of Fairfax, Virginia. Petitioner Kline retired, as the Chief of Police of the City of Fairfax, in June, 1977, and was fully compensated in accordance with the ordinances then in effect. Nevertheless, Kline seeks to obtain the benefits of an earlier ordinance, even though he did not retire when that earlier ordinance was in effect, although he knew the earlier ordinance was going to be modified. (Tr. Tran., p. 164)

Due to its evolutionary nature, many aspects of the personnel plan of the City of Fairfax have been modified

[1] Cf. *Weaver v. Graham*, 450 U.S. 24, 67 L.Ed.2d 17 (1981).

and limited since its original passage. Kline makes no objection to the City's ability to limit major benefits in the original plan, and even concedes that it is the City's perogative to do so. (Pet., p. 10). Nevertheless, Kline objects to one change in the City's plan because he claims he "relied" upon the former provision, although his own testimony makes clear he did not. In reviewing the ordinances set out below, it is important to keep in mind that Kline's contention is that he is entitled to be paid for all of his accrued sick leave on retirement, not that he was entitled to sick leave which was denied him. Not one day of sick leave which Kline accrued was ever denied or taken from him.

In addition, the City feels obligated to point out that much of the "factual background" asserted by Kline is not established in the record of this case. For example, the Petition references the deposition transcript of McNayr, Fleck, Foster, and Thomas were never admitted in evidence and were one of the bases for Kline's Petition for Appeal to the Virginia Supreme Court. (Pet. to Va. Sup. Ct., p. 26-27).

Prior to July 1, 1974, the City of Fairfax had a policy, but no ordinances, setting forth leave policies for its employees. The City's policy regarding leave was that, upon retirement, an employee would be paid in full for accumulated annual leave up to a thirty day maximum. If accumulated annual leave was less than thirty days, accumulated sick leave would be credited, at the ratio of three days sick leave for one day annual leave, until the thirty day annual leave maximum was met. Thus, prior to 1974, Kline did not work with the expectation that he would be paid for his accumulated sick leave, as such, upon retirement. Rather, his accrued sick leave was available to be used as a fractional credit towards reaching the ceiling of thirty days annual leave for which payment would be made at retirement. All other accrued leave in excess of this maximum was not compensated in any manner at retirement. Kline worked under this pol-

icy from 1953 until July 1, 1974, at which time Ordinance No. 1974-4 was adopted.

Ordinance No. 1974-4 was adopted on May 21, 1974 by the City of Fairfax, as required by Virginia Code § 15.1-7.1, to provide for a system of comprehensive personnel administration. This Ordinance became effective July 1, 1974 (Pet. App. 8a). The portion of this comprehensive personnel Ordinance relevant to this action, section 2-47(b), provided in part, for a single classification of leave. Upon retirement, an employee was to be paid in full for all accrued leave upto a maximum of 240 hours. Leave in excess of 240 hours was to be paid at a ratio of one day for each two days accrued. Employees who retired while this Ordinance was in effect were compensated as specified in the Ordinance. As can be seen, the net effect of this Ordinance was to allow employees to be paid at retirement for accrued sick or annual leave in excess of the old thirty day maximum.

In June 1975, the City amended the foregoing Ordinance by passing Ordinance No. 1975-27. This amendment provided that accrued leave in excess of 240 hours was to be paid at retirement at the same ratio of one day for each two days accrued, pursuant to the 1974 Ordinance, but that such payments would not be made for any leave in excess of 120 additional hours. Thus, a limit of 45 days was placed on the amount of leave an employee could accrue for purposes of payment at retirement. This forty-five day limit was to be applied prospectively, only to leave accrued from June 17, 1975, the date the Ordinance was adopted.

Although this amendment clearly limits the amount of leave to be compensated at retirement as originally set forth in the 1974 Ordinance, Kline makes no objection to it. In fact, he concedes that it is the City's perogative to do so. (Pet., p. 10). Nevertheless, Kline asserts the City could not make the next change in the City's evolving personnel plan.

On October 20, 1975, the City adopted the Ordinance in question in this case, Ordinance No. 1975-52, which amended the earlier 1975 Ordinance. This Ordinance re-established two categories of leave (sick leave and annual leave) for leave accrued from October 20, 1975 forward; it designated as annual leave *all* leave accrued from July 1, 1974 through October 20, 1975, and it reconstituted leave accrued prior to July 1974 into the two leave categories (sick and annual) which had then eixsted in the amounts as it had then existed for each employee. Upon retirement, eligible full-time employees would be paid for all their accrued annual leave on the basis of one day for each day of annual leave accrued up to a maximum of thirty days. Accrued annual leave in excess of thirty days was to be paid on a ratio of one day for each two days accrued. Thus, the Ordinance increased the amount of compensation available at retirement by eliminating the forty-five day limit. It is noteworthy that Kline does not object to this part of Ordinance No. 1975-52. It is also noteworthy that this Ordinance was more generous in terms of the compensation available at retirement than had been the case prior to the original 1974 Ordinance. It is true that under Ordinance No. 1975-52, no payment was to be made for accrued sick leave at retirement, but no such leave was taken away. Up until July 1, 1974, no City employee, including Kline, expected to be paid for accrued sick leave at retirement, except insofar as such leave, on a three-to-one ratio, would be credited towards the maximum payment of thirty days annual leave. Because Kline had well in excess of thirty days accrued annual leave on July 1, 1974, and also on his retirement, none of his sick leave would have been credited towards the thirty day annual leave limitation. The net effect of the final 1975 Ordinance, which is the only Ordinance in this entire scheme Kline challenges, was to eliminate crediting sick leave towards the amount of annual leave to be paid at retirement, which did not affect

Kline, and also *to eliminate* the old thirty day maximum on annual leave, which greatly benefited Kline.

From July 1, 1974 through October 20, 1975 Kline worked under the expectation that all "leave" accumulated from July 1, 1974 through October 20, 1975 would be credited towards the amount to be paid at retirement. The Ordinance in question honored that expectation by treating all such leave as annual leave.

In 1975, Kline knew that Ordinance No. 1975-52 was going to be passed by the City. (Tr. Tran., p. 163-165) Nonetheless, he chose not to retire before October 20, 1975 although he was eligible to do so, and he thereby lost his right to be compensated under the terms of the Ordinance then in effect. By his own admission Kline's decision when to retire was made without any regard to which Ordinance governed compensation for accrued leave at the time he retired. (Tr. Trans., p. 163-165) Contrary to the allegations in his Petition, Kline's own testimony shows he did not rely upon the compensation scheme for accrued sick leave in his decision not to retire. (Tr. Trans., p. 165) In accordance with the provisions of Ordinance 1975-52 in effect at the time of his retirement, Kline was paid for his accrued annual leave, including the "sick" leave accrued after July 1, 1974 which was treated as annual leave, when he retired. Because the Ordinance did not provide for compensation for other accrued sick leave, he was not so compensated.

Kline thereupon instituted suit against the City seeking payment for this other accrued sick leave despite the clear terms of the Ordinance. The Circuit Court of Fairfax County, Virginia dismissed Kline's suit on the merits, finding no property or vested rights. Thus, due process considerations need not and were not reached. The Supreme Court of Virginia affirmed the Circuit Court's judgment finding no reversible error and refusing Kline's Petition for Appeal. (Pet. App. 1a.) *See* Va. Code Anno. § 8.01-675 (Repl. Vol. 1977); *VEPCO v. Clark*, 179 Va. 596, 19 S.E.2d 693 (1942). This action followed.

SUMMARY OF THE ARGUMENT

The due process clauses in the amendments to the United States Constitution protect life, liberty, and property rights from arbitrary deprivation. Before he can show that the City violated his due process rights, Kline must first show that he had a property right to be compensated at retirement for that portion of his accrued sick leave in question and that the City deprived him of it.

The due process clauses do not provide the sources of the property rights. Generally, these are derived from state law. Therefore, in order to establish a violation of the due process clause, Kline must show that he had a property interest in being compensated at retirement for the sick leave in question under Virginia law. Under Virginia law, a municipal employee, in Kline's position, has no such property interest generally, and certainly not under the facts of this case. Moreover, the facts make clear that Kline was not deprived of any right to compensation he had upon his retirement.

ARGUMENT

Contrary to Kline's assertions, this case does not present a federal question worthy of this Court's review. In point of fact, this case does not present a federal question at all. Kline agrees that this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548 (1972) sets forth the standard for this case. *Roth* holds that (1) before due process protection is triggered, the plaintiff must have a liberty or property right at stake, and (2) these rights are derived from sources other than the United States Constitution, generally from state law. Thus, the real issue in this case is whether under Virginia law, Kline has a vested property right in one small segment of the City's evolving scheme for compensating accrued sick leave at retirement. The Virginia courts have ruled that he does not. Kline asks this Court to

undertake a full review of Virginia's interpretation of her own law that Kline had no such right. Such a case does not meet any of the criteria for a grant of a writ of certiorari as set forth in Rule 17 of Rules of this Court, nor is there any other reason for this Court to review this matter. Therefore, Kline's Petition should be denied.

I. As a public employee of the City of Fairfax, Virginia, Kline had no property or contract rights in the terms of his employment, and particularly no property or contract rights sufficient to preclude the City of Fairfax from changing its policies regarding payment for accrued sick leave at retirement.

The Fourteenth Amendment to the United States Constitution prevents any state from "depriving any person of life, liberty, or property, without due process of law." In interpreting and applying this section of the Constitution, this Court has stated that:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an indpendent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 33 L.Ed.2d 548, 561 (1972). Kline agrees that this is the federal standard governing this case. (Pet. p. 11) Thus, this case does not present a federal question for this Court to review. Instead, it is a question of Virginia law on Kline's retirement entitlements.

Assuming this Court undertakes a review of Virginia law, the first question presented by this case is whether

or not Kline had a property right, under Virginia law, to compensation at retirement for the accrued sick leave in question. There can be no doubt that the law of Virginia is that a public officer, such as Kline, former Chief of Police of Fairfax City, does not have a right, of any kind, to get or keep a public position or office, or to get or maintain any specific compensation for a public position or office.

As stated by the trial court in its Letter Opinion, (Pet. App. p.4a), the governing law in Virginia is clear: "the nature of [Kline's] employment with the City is 'inconsistent with either a property or contract right.'" As the Virginia Supreme Court stated in *Loving, et al. v. Auditor of Public Accounts*, 76 Va. 942, 946-48 (1882) (emphasis added):

> For obvious reasons of public policy, it is well settled that the power of the legislature in respect to changing the compensation of public officers is absolute, except so far only as its powers may be limited by the fundamental law of the State. . . . *The services rendered by public officers do not in this particular partake of the nature of contracts, nor have they the remotest affinity thereto.* As to a stipulated allowance, that allowance, whether annual, per diem or the particular fees for particular services, depends on the will of the law-makers. . . . As we have seen, there was no contract between the State and Taliaferro that his compensation should remain unchanged during his term of office; and that the power of the legislature to change it was *absolute and unquestionable.*

To the same effect is *Frazier v. Virginia Military Institute*, 81 Va. 59, 62 (1885), where the Supreme Court of Virginia stated:

> It must be regarded as settled, that with regard to appointments to offices like the one in this case, there is nothing like a contract raised as to the salary, emoluments or allowances attached to the office.

The following decisions are similar: *Booker v. Donohoe*, 95 Va. 359, 363, 28 S.E. 584 (1897) (emphasis added):

> In this country offices are not hereditaments, and the right to hold office and receive its emoluments does not grow out of any contract with the State, and that an office is not property in the sense that cattle and land are property of the owner . . . the legislature may abolish the office during the term of the incumbent or diminish the salary, *or change the mode of compensation*, subject only to Constitutional restrictions. . . .

Sinclair v. Young, 100 Va. 284, 290-91, 40 S.E. 907 (1902) (citations omitted):

> Members of electoral boards are not Constitutional officers. The office is a legislative creation; and an election to it does not constitute a contract. When a noffice is created by statute it is wholly within the control of the Legislature. The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may be even taken away without abolishing the office. There are no constitutional limitations upon that power, and the Legislature may exercise it without let or hindrance.

Johnson v. Black, 103 Va. 477, 489-91, 49 S.E. 633 (1905) (emphasis added):

> Services rendered by public officers do not partake of the nature of contracts and have no affinity thereto. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. . . . [A public officer] cannot legally claim additional compensation for the discharge of [his] duties, even though the salary be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties within the scope of the charter powers pertaining to the officer are increased but not his salary. *Whenever he considers the compensation inadequate, he is at liberty to resign.*

More recently, the Virginia Supreme Court affirmed these principles in *Walker v. Massie*, 202 Va. 886, 889, 121 S.E.2d 448 (1961), stating:

> Public offices are not held by grant or contract; but are created by the law-making power, and no person has a vested right in them.

The policy behind these rules of law is obvious. Any benefit given by the government to its employees must necessarily be paid by the public. Flexibility must therefore be maintained not only to satisfy competing social policies and programs, but also to insure fiscal soundness. To rule otherwise is to mandate the perpetuation of all prior personnel policies as well as all prior social policies and programs generally. This would deter legislative experimentation as well as possibly forcing municipal bankruptcies. It would also be hostile to the principles of democratic, representative government.

The public officer, such as Kline, must be deemed to undertake his duties with knowledge of these principles. Unlike the private employee, the public officer knows that a number of restrictions can be placed upon him or her which may not be permissible in the private sector. Various outside activities presenting possible conflicts of interest can be proscribed, as can various financial disclosure requirements. Political activity can be restricted in ways that would be constitutionally offensive in the private sector. So, too, the public officer is chargeable with the knowledge that the office itself can be abolished, its duties changed, or the emoluments of the office radically altered. As the Virginia Supreme Court stated in *Walker*, faced with any such change the public officer has two choices: first, he can accept the alteration and continue employment; or second, the public officer can quit. The greater good of the public requires such a policy, a policy which is simply one of the facets of public employment.

This review of Virginia law clearly shows that Kline had no property or contract right to his job or his compensation at any specified rate. Accordingly, he cannot claim any vested rights in general, nor specifically with respect to the City's scheme for compensating accrued leave at retirement.

II. Ordinance No. 1974-4, which was the first of three ordinances regarding the City's policies for payment of accrued leave at retirement, did not confer vested contract or property rights on Kline.

The original 1974 Ordinance, No. 1974-4, for the first time formalized, in a comprehensive manner, the personnel plan of the City of Fairfax. With respect to payment at retirement of accrued sick leave, it changed the policy which had previously been in effect. This Ordinance was one of a series of measures which were developed over time to provide a system of personnel administration that was consistent with fiscal integrity. On its face, Kline's challenge to one small section in one of these three Ordinances, while conceding, either expressly or implicitly, the validity of the other changes and modifications, is without merit. The situation would be different if Kline had been told that he would receive a specified amount of compensation, had performed his job with that expectation, and then was told he would be compensated in a lesser amount. If that were the situation, Kline may well have some property rights. But that is not the situation before this Court. Kline worked from 1953 until July 1, 1974 with the understanding that he would be compensated upon retirement for a maximum of thirty days accrued annual leave and no compensation for accrued sick leave.[2] Under Ordinance

[2] Accrued sick leave could be converted into annual leave to reach the thirty day maximum at a ratio of three sick leave days to one annual leave day. Because Kline had in excess of thirty days accrued annual leave on July 1, 1974 (Pet. p. 11), he would receive no compensation for his accrued sick leave.

No. 1975-52, Kline was compensated precisely in the manner he had expected when he worked those days from 1953 until July 1974.

From July 1, 1974 until June 17, 1975, during which Ordinance No. 1974-4 was in effect, Kline worked expecting to be compensated at retirement for the leave he was accruing. Ordinance No. 1975-52, which is the Ordinance Kline challenges, paid him for that leave.

From July 17, 1975 until October 20, 1975, during which Ordinance No. 1975-27 was in effect, Kline worked knowing the leave he was accruing would be compensated at retirement up to a maximum of forty-five days. Ordinance 1975-52 paid him as he expected. Although Ordinance No. 1975-27 clearly limits the benefits of Ordinance No. 1974-4, Kline makes no objection to it and even concedes that it was a legitimate exercise of the City's authority to do so. (Pet. p.10)

From October 20, 1975, when Ordinance No. 1975-52 went in effect, Kline worked with the knowledge that he would be compensated at retirement for his accrued annual leave only. He was paid as he expected.

The only remaining theory on which Kline can be relying to show a property right is that when the City enacted its original 1974 Ordinance, No. 1974-4, it vested its employees with a scheme for compensating accrued leave at retirement that cannot ever be changed. If this were true, then it seems the 1974 Ordinance itself would be invalid, given the fact that the City had a previous policy towards compensating accrued leave at retirement. Kline advances no good reason as to why the original scheme established by policy, as opposed to Ordinance, is somehow not immutable, while the original comprehensive Ordinance is. Moreover, Kline's position would appear to prevent any modification of a retirement scheme, whether public or private. Not only is such a position devoid of logical merit, but it would imperil all retire-

ment systems, including Social Security. Certainly, both public and private retirement plans can be changed. In particular, the City of Fairfax can lawfully change its method for compensating accrued leave at retirement when Kline himself was fully compensated for all such leave under the expectation he had during the time when he was accruing the leave. Moreover, Kline's theory ignores the facts established in this case, confuses earned compensation and benefits, and overlooks the fact that Kline's entitlement to the benefit involved was contingent, not vested.

a. Contrary to the assertions in his Petition, Kline did not rely upon the expectation of payment at retirement of his accrued sick leave.

Throughout his Petition, Kline attempts to posit a case of detrimental reliance. The facts of this case are otherwise. Specifically, Kline himself did not rely upon the scheme for compensating accrued leave at retirement in making his decision on when to retire. Obviously, Kline's retirement entitlements were governed by the Ordinance in effect on the date of his retirement. When Kline retird, he receives the full benefits of the Ordinance then in effect.

A review of Kline's deposition testimony clearly shows that Kline had no detrimental reliance.

> [Counsel for Defendant] Q. From the time you came there in August of '54 until your retirement, you never really considered leaving the City and working somewhere else?
>
> [Plaintiff] A. No, sir, I wanted to be a policeman, and that's what I was.
>
> . . . .
>
> Q. Would that include the time of all of these changes in the retirement plan and the accumulated leave plan?

A. Yes, sir. In fact, I could have retired. *I knew of the ordinance change prior, in enough time that I could have retired if I wanted to and collected my money.*

. . . .

Q. So you would have been eligible for retirement on August 13, 1974. Is that right?

A. Yes, sir. I could retire before the revised, before the, between the time they renewed the grandfather clause and drafted the last ordinance. *If I had wanted to retire, I could [sic] retire during that period and collected my money and I wouldn't be here today.*

Q. Why didn't you?

A. Because I didn't want to retire.

Q. Was there any financial reason why you didn't want to retire?

A. No, sir.

Q. Was there no increased retirement compensation associated with working longer than 20 years?

A. *Yes, but that had nothing to do with it.*

. . . .

Q. Okay. If you say that wasn't a factor, what was your reason for not wanting to retire?

A. Well, I just wanted to stay in the Police Department. I liked the work.

Q. You had just enjoyed your job, and you wanted to stay there.

A. Yes, sir.

Deposition of Leonard P. Kline, pp. 20, 21, 22 (Oct. 15, 1979) (emphasis added)

Kline's testimony at trial was essentially the same. (Tr. Tran. p. 161-165) Kline has thus admitted that he elected to retain his position with the City for reasons wholly

outside the City's scheme for compensating accrued sick leave at retirement. He obviously enjoyed his job and wished to continue for that reason alone. Clearly, Kline did not rely to his detriment upon the expectation of being compensated at retirement in accordance with the terms of the original 1974 Ordinance. Yet, in this action, that is precisely what he seeks. This is not a case of detrimental reliance by Kline; on the contrary, it is a case of a knowing and intelligent waiver by Kline of his available benefits under the terms of the 1974 Ordinance. He knew he could have retired and received those benefits, but for personal reasons, he chose not to. Having made his decision not to retire during the time when that Ordinance was in effect, when he knew or should have known the consequences of that decision, he cannot be heard to complain now; particularly since the 1975 Ordinance increased the benefits he expected when he worked from 1953 through 1974 by removing the thirty day limit on payment for accrued annual leave.

b. Kline confuses earned compensation with employee's benefits.

To the extent that Kline considers sick leave to be a compensable benefit of the same nature as annual leave, his argument fails for lack of factual basis. The fact is that in Virginia, as clearly stated by the trial court, sick leave is considered a different emolument of employment than annual leave. (Pet. App. p. 5a) As can be seen from the limitations on the use of sick leave in the city's pre-1974 policy and under the 1975 Ordinance, it is a benefit of employment to assure that employees are not penalized by the unfortunate and involuntary circumstance of being injured or ill.[8] (Kline Tr. Exh. 1).

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[8] The pre-1974 policy of the City on sick leave is analogous, for example, to military leave. An employee is not penalized for his or her service to the country, but would not be compensated for the military leave *benefit* if he or she were not a member of the Armed Services. (Kline Tr. Exh. 1).

As the trial court stated in its letter opinion, an appropriate and accurate analogy to sick leave is term life insurance. "Should the insured party survive beyond the term of the policy no benefit is obtained and the premiums paid during the term are lost." (Pet. App. p. 5a) In the Virginia proceedings, Kline attempted to avoid the analogy, arguing instead that sick leave could be compared to either term life insurance or whole life insurance, and the City chose a "whole life" program and then changed to a term life program. (Pet. to Va. Sup. Ct., p. 23) Even assuming *arguendo* this were true, Kline is simply incorrect in stating that the City may not legally "switch" policies. As conceded on page 11 of his Petition for Appeal to the Virginia Supreme Court, Kline agrees that the "City may choose to pay or not to pay for unused 'sick leave' at its discretion."

As noted previously, the City's leave policies, like that of all governments, are evolutionary in nature. Kline cites no authority to suggest that once a given policy is adopted, it may never thereafter be changed.

Unlike sick leave, annual leave is more akin to *earned* compensation (like a salary), to be taken at the will of the employee for whatever purposes he or she sees fit.[4] The cases largely relied on by Kline support this distinction, holding that employees who have earned compensation (like wages, salary, commissions, vacations) cannot be divested of it. However, these cases are cited by Kline indiscriminately as if they were applicable to sick leave. For example, Kline cites *Mississippi v. Miller*, 276 U.S. 1974, 72 L.Ed. 517 (1928), as apparently applicable to sick leave when it is actually applicable to compensation in the form of commissions on the amount of delinquent taxes collected by the plaintiff. (Pet., p. 13.) Clearly,

[4] The City does not concede, however, that annual leave *is* a form of earned compensation. Instead, the City simply wishes to point out that annual leave is more easily aligned with a compensation analysis than is sick leave.

such compensation was in fact earned *salary*, not sick leave benefits. Similarly, Kline cites *Bennett ex rel. Arizona State Personnel Commission v. Beard*, 27 Ariz. App. 534, 556 P.2d 1137 (1976), as relevant to this case when Kline admits the decision only concerns annual leave (Pet. p. 14.)

In addition, on page 16 of his Petition, Kline cites *Ramey v. State*, 296 Mich. 449, 296 N.W. 323 (1941) although it is clear from the direct quote used by Kline that it was applicable to vacation with pay, i.e., annual leave:

> Under the facts in this case, plaintiffs had performed all acts necessary to insure themselves the right of a *vacation with pay*, or if dismissed before exercised, to receive compensation for the unused portion of their annual leave allowances. There was nothing remaining for them to do except exercise the right which depended on no contingency, but was complete and matured. *In my opinion, vacation with pay is not a gratuity; it is compensation for services rendered.* It is a rule that after the services are rendered under a law which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate and the contract cannot be impaired by subsequent legislation.

(citations omitted and emphasis added)

It must be remembered that Kline's burden is to establish that under *Virginia* law he has a property right to payment of his accrued sick leave. Kline's citations to the law of other jurisdictions which may give their public employees the right to such compensation does not establish Kline's right to such in Virginia. The trial court concluded that Kline had no such right in Virginia and the Supreme Court of Virginia affirmed that decision.

Moreover, Virginia is not alone in the position that sick leave is a benefit of, and not compensation for em-

ployment and that a municipality's policy of paying employees for accrued sick leave may be changed at any time since the right to such pay was not vested. *See, e.g., Hajek v. City of St. Paul*, 35 N.W.2d 705 (Minn. 1949)

In a case of precedential value to this matter, the Supreme Court of Indiana, in *Ballard v. Bd. of Trustees*, 324 N.E.2d 813, 815 *appeal dismissed*, 423 U.S. 806, 46 L.Ed.2d 27 (1975) dealt with an action brought by a retired city policeman for restoration of his pension which had been terminated subsequent to his conviction of a felony. The Supreme Court of Indiana noted that:

> pensions under a state compulsory contribution plan like the Police Pension Fund have traditionally been considered gratuities from the sovereign involving no agreement of the parties and, therefore, creating no contractual rights. . . .

The *Ballard* court continued by observing that:

> The involuntary plans are gratuities from the sovereign as distinguished from voluntary or optional pension plans, normally called 'annuities,' where there is an agreement that a deduction shall be made out of the salary of the employee. . . . In a voluntary system the employee theoretically may keep his money or pay it back to the fund, while under the involuntary system the money, although denominated compensation, is never owned or controlled by the employee but retained by the state and is therefore, in practical effect a contribution by the state. Under this theoretical distinction there is no vested right in the money residing in an involuntary or compulsory pension system.

An analogy may be drawn between the facts of the present case and those of *Ballard*. Here, Kline participated in a "compulsory" sick leave system in the sense that he accrued leave whether he wanted or not. Such leave, like the pension monies referred to in *Ballard*, is "in practical effect a contribution by the [city]." *Id.* Such circum-

stances clearly provide no vested right to the "gratuity" provided by a government to its employees.

Since *Ballard* was brought to this Court on appeal, the dismissal of the appeal is a decision on the merits and of precedential value in the determination of like issues. *Hicks v. Miranda*, 422 U.S. 322, 344, 45 L.E.2d 223 (1975). *Ballard*, therefore, is direct authority from this Court supporting the City's position.

c. Kline has no right to seek the benefits of Ordinance No. 1974-4, nor did any rights thereunder vest because Kline failed to meet the contingency of retiring during the effective period of the Ordinance.

Even if Kline could show that he had a contract or property right to compensation for accrued sick leave at retirement and that payment for unused sick leave is compensation, not a benefit, Kline cannot show that his rights to such were vested. Again returning to Virginia law to establish a property interest, the Virginia Supreme Court has defined when a right is vested, saying "we would define it as a right, so fixed, that it is not dependent on any future act, contingency, or decision to make it more secure." *Kennedy Coal Corp. v. Buckhorn Coal Corp.*, 140 Va. 37, 45, 124 S.E. 482 (1924). A review of the Ordinance shows that Kline's "rights" were not vested. Ordinance 1974-4 clearly states that "[*u*]*pon separation or retirement* an employee shall be paid in full for all accrued leave. . . ." (emphasis added)

Kline did not take that last step that would make his right secure, he did not retire while Ordinance No. 1974-4 was in effect, although he was eligible to do so and aware of its impending modification. His right to the benefit conferred was contingent upon his retirement during the period the Ordinance was in effect. Kline failed to meet that contingency and his rights never vested.

Contrary to the statements in his Petition, Kline did not rely upon the continuation of the benefits in Ordinance No. 1974-4. All Kline had to do to satisfy the condition of his collecting the compensation of which he now complains was retire sometime after July 1, 1974 and before October 20, 1975, before Ordinance 1975-52 became effective. Although he had the opportunity to do so, he chose not to. Most importantly, in so choosing, he did not rely on the continuation of Ordinances 1974-4 and 1975-27. Instead, Kline merely wanted to continue working. He made his own choice, and now seeks to avoid the effects of that choice. Having made that choice, Kline is now estopped from claiming compensation for accrued sick leave under an Ordinance upon which he did not rely.

III. Kline was not deprived of any compensation for which he had agreed to work for the City.

As previously pointed out, during the various stages of the City's evolutionary personnel plan, Kline was accruing leave under different sets of expectations. When he retired, he was compensated in accordance with those expectations. He should not be heard to ask for more.

CONCLUSION

In order to show a violation of due process, Kline must show that he has a property right under Virginia law to be compensated at retirement for the sick leave in question and that he was deprived of this right. Kline has failed to meet this burden. As held by the Virginia courts in this case, Virginia law is clear that a public employee has no property or contract rights to the terms of his employment. Kline did not rely upon Ordinance No. 1974-4 to compensate him for his unused sick leave because he did not work with the expectation that he would be so compensated and it was not a factor in his decision as to when to retire. The Virginia courts have

stated in this case that payment for unused sick leave is a benefit of, not compensation for, employment and that Kline's rights to such benefit were not vested because he failed to retire during the operative period of the Ordinance conferring the benefit.

Kline and the City do not disagree on the federal law controlling this issue. The only disagreement is whether Kline's "rights" vested under state law to trigger the operation of federal law. Virginia has twice stated in this case that under Virginia law, Kline's rights did not vest. Granting Kline's Petition for a Writ of Certiorari will only serve to put this Court in the position of reviewing Virginia's law on municipal employees' retirement entitlements. This case does not present the situation where a state court has decided an important federal question, or decided a federal question in a way in conflict with the decision of another state court. Instead it presents a question of Virginia law on the vesting of public employees benefits. Virginia has answered the question, in keeping with the dictates of federal law, and a review of that decision by this Court is not warranted.

WHEREFORE, the Respondent, The City of Fairfax, Virginia, respectfully requests this Court to deny Kline's Petition for a Writ of Certiorari and to award it its costs herein incurred.

Respectfully submitted,

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